STATE OF MICHIGAN

COURT OF APPEALS

ROGER L. SCHIEFLER, Plaintiff-Appellant,	UNPUBLISHED February 23, 2006
v	No. 262425 Kent Circuit Court
WARNER, NORCROSS & JUDD, Defendant-Appellee.	LC No. 03-091982-NM

Before: Whitbeck, C.J., and Talbot and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition to defendant in this legal malpractice case. We reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

Plaintiff was a former 50 percent shareholder and director of Synergis Technologies Group Corporation (Synergis), a business originally founded by his father. According to plaintiff, when he joined Synergis in the early 1970s, his father was using defendant to perform personal legal work and legal work for the company. Plaintiff himself used defendant as his "law firm for all purposes," including for estate planning and other personal legal matters, and to represent his interests in all matters involving his stake in Synergis. Defendant represented plaintiff in the early 1980s, when plaintiff brought Jay Groendyke aboard as a 50 percent owner. At the time that plaintiff was contemplating making Groendyke an equal owner with plaintiff, defendant advised plaintiff that such an ownership scenario would create a deadlock if the owners disagreed on an issue. Plaintiff disregarded defendant's advice and until 1996 plaintiff and Groendyke comprised the entire corporate board.

In 1996, defendant prepared a buy-sell agreement for signature by plaintiff and Groendyke that provided for the forced sale of their respective shares in Synergis in the event of termination or resignation of any of the shareholders. The signed document provided that shareholders could voluntarily resign or could be removed from the corporation without cause. There is no dispute that defendant was acting concurrently as counsel for plaintiff, Groendyke, and Synergis in connection with this agreement. This fact is found in paragraph 30 of the agreement, which states:

> The parties acknowledge and recognize that Warner Norcross & Judd LLP has acted as counsel for each Company and its shareholders from time to time. To the extent that Warner Norcross and Judd LLP represents a Company and its shareholders, that representation constitutes a conflict of interest. The parties nonetheless hereby consent to their joint representation by Warner Norcross & Judd.

The potential for conflict in this representation was discussed and waived by the parties, who did not want other attorneys involved. Shortly thereafter, defendant prepared a shareholder resolution adding Synergis' chief financial officer Roger Orchard as a third director to the Synergis Board. It is undisputed that defendant and plaintiff did not have any communications regarding this resolution. Plaintiff asserts that he was never told that Orchard's addition to the board of directors would make it possible for him to be terminated and forced to sell his interest in Synergis over his objection; rather, he believed that "they voted [their] stock" and therefore, that his 50 percent ownership interest would prevent such action from being taken against him. According to plaintiff, had he realized the effect of adding Orchard to the board, he would not have signed the 1996 shareholder resolution.

In November 2001, the event occurred that gave rise to this action. Groendyke and Orchard voted to terminate plaintiff's employment with Synergis and, pursuant to the 1996 buy-sell agreement, he was forced to sell his ownership interest in the company. Thereafter, plaintiff filed the instant action alleging that defendant committed malpractice by preparing and tendering the 1996 shareholder resolution for his signature without advising him that the resolution materially changed the importance of terms in the buy-sell agreement, that it altered defendant's prior advice to plaintiff that the 50/50 ownership scenario would result in a deadlock if he and Groendyke disagreed, and that it could result in the termination of his employment with and ownership interest in the company. Defendant filed an answer and a motion for summary disposition pursuant to MCR 2.116(C)(10), which the trial court granted. This appeal ensued.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), on the basis that defendant represented only Synergis, not plaintiff, in connection with the drafting of the shareholder resolution and therefore defendant had no duty to advise anyone individually of the consequences of that resolution. Defendant further argued that despite the fact that defendant had done work for plaintiff in estate planning, defendant's role as plaintiff's estate planning counsel did not extend to require defendant to warn plaintiff that there might be 'problems down the road' if the buy-sell agreement were to be triggered by a two-to-one vote of the board of directors that went adverse to him.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Johnson v A & M Custom Built Homes*, 261 Mich App 719, 721; 683 NW2d 229 (2004). In reviewing an order granting summary disposition under MCR 2.116(C)(10), a reviewing court examines all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995). Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Plaintiff argues that the trial court erred in determining that there was no attorney-client relationship between him and defendant at the time the 1996 shareholder resolution was drafted. Indeed, it is undisputed that plaintiff and defendant had a decades-long attorney-client relationship, spanning from the 1970s until after plaintiff's ouster from Synergis in 2001, which encompassed all of plaintiff's personal and business matters, including the preparation of the 1996 buy-sell agreement only a few months before the drafting of the resolution at issue. Further, it is clear that plaintiff sought and defendant rendered legal advice and legal services relating to plaintiff's ownership interest in Synergis, on which plaintiff relied.

From the outset, we adopt the statement that "[t]he rendering of legal advice and legal services by the attorney and the client's reliance on that advice or those services is the benchmark of an attorney-client relationship." *Macomb Co Taxpayers Ass'n v L'Anse Creuse Public Schools*, 455 Mich 1, 11; 564 NW2d 457 (1997). Even though plaintiff did not seek advice specifically about the shareholder resolution, defendant is not absolved from its duty to advise plaintiff of the risks involved in the shareholder resolution. The facts presented reveal that defendant routinely advised plaintiff about his personal and business interests, including instances in which defendant took the initiative to advise plaintiff proactively, without plaintiff's inquiry or request. The shareholder resolution affected the import of terms in the 1996 buy-sell agreement and advice defendant had previously given to plaintiff regarding the impact of plaintiff's 50 percent ownership interest in Synergis. Examining all of these factual considerations together with the entire record before us in a light most favorable to plaintiff, reasonable minds could differ regarding whether the parties' relationship necessarily encompassed the advice relating to the shareholder resolution.

We also conclude from our examination of the record that the trial court erred in determining that defendant had no duty to advise plaintiff regarding the legal impact of the shareholder resolution on his authority over his own employment with and ownership interest in Synergis. The determination whether a duty exists is a question of law. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). This Court reviews questions of law de novo. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996); *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 506; 556 NW2d 528 (1996).

As our Supreme Court explained in *Simko*, *supra* at 655, "[d]uty is any obligation the defendant has to the plaintiff to avoid negligent conduct. . . . In legal malpractice actions, a duty exists, as a matter of law, if there is an attorney-client relationship." Stated differently, "[a]n attorney has an implied duty to exercise reasonable skill, care, discretion, and judgment in representing a client." *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002), citing *Simko*, *supra* at 655-658.

Defendant argues that it had no duty to advise plaintiff that his "business decision" to add a third director to the Synergis board could pose potential difficulties for him; the trial court agreed, noting that no such duty arose from defendant's estate planning work for plaintiff. Contrary to the findings below, we find that the question presented is not whether defendant was required to advise plaintiff about the wisdom of a business decision to add a third director because it had served as his estate planning counsel, but rather, the question is whether defendant had a duty to advise plaintiff that signing the resolution had the legal effect of exposing him, for the first time, to the possibility of termination of his employment without cause and the forced sale of his shares by a majority board vote over his objection. When framed in this manner, it

becomes apparent that the duty did exist because it arose as a result of defendant's ongoing attorney-client relationship with plaintiff. Defendant bore the same duty to advise plaintiff in 1996 that it had when defendant rightfully advised plaintiff of the risks associated with bringing an equal partner into the corporation. Defendant took no affirmative action to sever the attorney-client relationship between itself and plaintiff, thus we find that the duty to plaintiff was ongoing.

Defendant next argues that if this Court were to impose upon defendant a duty to plaintiff to advise him of the impact of the resolution, that such a duty would be overly burdensome because defendant performed only "scrivener work on the resolution." Because it only did "scrivener work on the resolution," defendant contends that the foreseeability of harm and the degree of certainty of injury to plaintiff were remote and that it bears no responsibility for plaintiff's termination and ouster. Defendant asserts that its only duty was to use reasonable care and skill to draft a resolution that comported with Orchard's instructions. In support of this argument, defendant cites *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2001), in which this Court determined that when asked to draft a power of attorney, the defendant's duty was to draft a power that comported with the plaintiff's intentions and not to dissuade the plaintiff from her choice of agent and/or to ensure that she chose an appropriate agent. This Court noted in that case that holding otherwise could render an attorney "liable for allegedly failing to challenge a client's choice of business partner, personal representative, or other person to whom a client chooses to entrust or align his personal interests." *Id.* at 508. The *Persinger* Court concluded that the defendant attorney had made "reasonable inquiry" into the plaintiff's understanding of the nature and legal effect of the power of attorney before plaintiff executed it and that such inquiry constituted the exercise of reasonable judgment with regard to that execution. *Id.* at 509.

Our holding in *Persinger* is applicable to the facts before us, but in a manner incongruous to the position argued by defendant. While the *Persinger* Court declined to assess a duty to advise a client that his choice of an individual with whom to align his interests can at times be unwise, we also ruled that the attorney exercised reasonable professional judgment by making reasonable inquiry into whether the client understood the nature and legal effect of the document she was executing appointing a particular individual as her agent. Thus, our holding in *Persinger* is exactly the duty that plaintiff asserts that he was owed by defendant in this case: the duty to make reasonable inquiry into whether he understood the legal effect of the resolution, especially in the context of earlier advice and services rendered to plaintiff by defendant. Defendant repeatedly refers to execution of the shareholder resolution as a "business decision." However, plaintiff does not assert that defendant had a duty to dissuade him from adding Orchard as a director, but rather, that as his attorney, defendant had a duty to advise him that adding a third director had certain legal consequences, the most important of which was that it allowed his employment with Synergis to be terminated against his will and his ownership interest to be forcibly sold. Thus, at a minimum, defendant owed plaintiff a duty to advise him of potential problems in the 1996 shareholder resolution just as it had done when plaintiff requested that Groendyke be brought on as an equal partner. Further, we find unpersuasive a policy argument that when an attorney is acting as a "scrivener" there is no basis for imposing any duty on that attorney. In lieu of adopting defendants "scrivener" argument we hold that

defendant owes its clients "an implied duty to exercise reasonable skill, care, discretion, and judgment in representing" them regardless the degree of effort required to complete the work requested. *Mitchell*, *supra* at 677.[1]

Defendant argues, as an alternative basis for affirmance, that the trial court erred in determining that a question of fact exists regarding whether defendant was the legal cause of plaintiff's injury. As our Supreme Court explained in *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004):

> "Proximate cause" is a legal term of art that incorporates both cause in fact and legal (or "proximate") cause. We defined these elements in *Skinner v Square D Co*, [445 Mich 153, 162-163; 516 NW2d 475 (1994)]:
>
> > The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the forseeability of consequences and whether a defendant should be held legally responsible for such consequence.

In *Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999), this Court explained:

> Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. To find proximate cause, it must be determined that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. While the issue of proximate cause is usually a factual question to be decided by the jury, the trial court may dismiss a claim for lack of proximate cause when there is no issue of material fact. [Citations omitted.]

Defendant undertook to provide plaintiff with legal advice and services, sometimes on its own initiative and without specific request, but always for its own economic gain. In the absence of defendant's failure to comply with its duty to advise plaintiff of the legal consequences of the 1996 shareholder resolution, plaintiff could not have suffered the injury of which he complains. Nothing in the period between the execution of the resolution and plaintiff's ouster operated to

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[1] Moreover, defendant's "scrivener" argument would be pertinent if plaintiff's challenge was to the particular phrasing or language used in the shareholder resolution; that is, that the result or effect of the resolution was other than as intended. If that were the case, defendant then could claim, "We just wrote what we were told to write." But, plaintiff's main contention is that defendant failed to advise him of the possible impact of the resolution on the security of his employment with and ownership interest in the company. Therefore, defendant's "scrivener" argument is inapt.

break this chain of causation. Thus, defendant is not entitled to summary disposition on this basis.

During oral argument, defendant argued extensively that MRPC 1.7 and 1.8 had not been violated. We note that while defendant relied heavily on MPRC 1.7 and 1.8 during oral argument, in their initial brief MPRC 1.6 and MPRC 1.8b are only mentioned in passing, in the context of a footnote. Because defendant was acting as plaintiff's attorney at the time of the drafting of the shareholder resolution and because defendant failed to explain any of the potential problems to plaintiff that signing such a document could produce for plaintiff, we are not persuaded by defendant's raising of MPRC 1.7 and 1.8 during their oral argument. Furthermore, the Michigan Rules of Professional Conduct required defendant to have a conversation with plaintiff regarding the nature of the conflict and the possible consequences of the resolution to plaintiff. See generally, *Barkley v Detroit*, 204 Mich App 194; 514 NW2d 242 (1994).

Because we find that the trial court erred in determining that defendant was entitled to summary disposition, we need not address plaintiff's assertion that summary disposition should have been denied pursuant to MCR 2.116(H)(2).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck,
/s/ Michael J. Talbot
/s/ Stephen L. Borrello